Supreme Court, U.S.
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No. 91-1958

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DONALD L. HELLING, CAROL E. PLOYHAR, JOHN V. IGNACIO, RONALD J. ANGELONE, and CHARLES HORN,

Petitioners,

v.

WILLIAM McKINNEY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE 3, 1992
CERTIORARI GRANTED JUNE 29, 1992

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WILLIAM McKINNEY #13355
NEVADA STATE PRISON
POST OFFICE BOX 607
CARSON CITY, NEVADA 89701

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

WILLIAM McKINNEY, (Full Name) Plaintiff, vs. PAT ANDERSON, CAROL PLOYER, H.L. WHITLEY, GEORGE SUMNER, JOHN NYE, DISTRIBUTORS AND OWNERS OF C.M. PRODUCTS INC., BROWN & WILLIAMSON TOBACCO CORPORATION, R.J. REYNOLDS TOBACCO CO. Defendants.	Case No. CV-N-87-36-ECR (To be supplied by the Clerk) CIVIL RIGHTS COMPLAINT PURSUANT TO 42 U.S.C.§1983 JURY TRIAL DEMAND (Filed January 28, 1987)

A. JURISDICTION

1) WILLIAM McKINNEY, is a citizen of Nevada who presently resides at P.O. Box 607 N.S.P. CARSON CITY, NEVADA 89701 NEVADA STATE PRISON.

2) Defendant H.L. WHITLEY is a citizen of CARSON CITY, NEVADA 89701 POST OFFICE BOX 607 N.S.P. and is employed as WARDEN. At the time the claim(s)

alleged in this complaint arose, was this defendant acting under color of state law? Yes **XXX** No ___ If your answer is "Yes", briefly explain: HE IS CHARGED WITH THE IMMEDIATE CONTROL OF THE MAXIMUM SECURITY PRISON AND THE WELFARE OF ALL PRISONERS CONFINE (SIC) THEREIN.

3) Defendant GEORGE W. SUMNER is a citizen of CARSON CITY, NEVADA P.O. BOX 607 N.S.P., and is employed as DIRECTOR OF PRISON. At the time the claim(s) alleged in this complaint arose was this defendant acting under color of state law? Yes **XXX** No ___ If you answer is "Yes", briefly explain: HE IS CHARGED UNDER NEVADA STATUTES N.R.S. 209;4.09 et seq., WITH RESPONSIBLITY (SIC) TO SUPERVISE AND MANAGE THE PENAL, REFORM AND CORRECTIONAL INSTITUTION OF NEVADA; AND TO

ENFORCE ALL RULES AND REGULATIONS OF PRISON THEREIN.

(Use the back of this page to furnish the above information for additional defendants.) **SEE BACK OF PAGE**

[Back Page] DEFENDANT PAT ANDERSON IS A CITIZEN OF NEVADA AND HIS BUSINESS ADDRESS IS N.S.P. P.O.BOX 607 CARSON CITY, NEVADA 89701 SHE IS EMPLOYED AS ASSOCIATE WARDEN. AT THE TIME THE CLAIMS IN THIS COMPLAINT AROSE SHE WAS ACTING UNDER COLOR OF STATE LAW.

DEFENDANT CAROL PLOYER IS A CITIZEN OF NEVADA AND HER BUSINESS ADDRESS IS N.S.P. P.O. BOX 607 CARSON CITY, NEVADA 89701. SHE IS EMPLOYED AS A UNIT COUNSELOR AT THE PRISON. AT THE TIME THE CLAIMS IN THIS COMPLAINT AROSE. SHE WAS ACTING UNDER STATE LAW.

DEFENDANT R.J. REYNOLDS TOBACCO COMPANY IS A CITIZEN OF WINSTON-SALEM, N.C. 27102, U.S.A. AND HE IS UNDER BUSINESS

CONTRACT WITH DEFENDANT PRISON OFFICIALS. AT THE TIME THE CLAIMS IN THIS COMPLAINT AROSE, HE WAS ACTING UNDER COLOR OF STATE LAW: HE HAS A BUSINESS CONTRACT WITH DEFENDANT-PRISON OFFICIALS.

DEFENDANT JOHN NYE IS A CITIZEN OF NEVADA. HIS BUSINESS ADDRESS IS N.S.P. P.O. BOX 607 CARSON CITY, NEVADA 89701. HE IS EMPLOYED AT THE NEVADA STATE PRISON AS A STORE MANAGER. AT THE TIME THE CLAIMS IN THIS COMPLAINT AROSE HE WAS ACTING UNDER COLOR OF STATE LAW.

DEFENDANT C.M. PRODUCTS INC., IS A CITIZEN OF CALIFORNIA. HIS BUSINESS ADDRESS IS P.O. BOX 15436 SACRAMENTO, CALIFORNIA 95813 U.S.A. HE IS A DISTRIBUTOR OF CERTAIN TOBACCO PRODUCTS. AT THE TIME THE CLAIMS ALLEGED IN THIS COMPLAINT AROSE, THIS DEFENDANT WAS ACTING UNDER COLOR OF STATE LAW: HE HAS A BUSINESS CONTRACT WITH DEFENDANT PRISON OFFICIALS.

DEFENDANT BROWN & WILLIAMSON IS A CITIZEN OF LOUISVILLE, KY. 40232 U.S.A. AT THE TIME THE COMPLAINT AROSE THIS DEFENDANT WAS ACTING UNDER COLOR OF STATE LAW: HE HAS A BUSINESS CONTRACT WITH DEFENDANTS-PRISON OFFICIALS.

4) Jurisdiction is invoked pursuant to 28 U.S.A. §1343(a)(3) and 42 U.S.C. §1983. (If you wish to assert jurisdiction under different or additional statutes, you may list them below.) PLAINTIFF ALSO INVOKES THE PENDENT JURISDICTION OF THIS COURT; 42 U.S.C. 1981; 42 U.S.C. 1985 (3); 42 U.S.C. 1985; AND THE FIRST AND EIGHTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES, AND F.R.C.P. RULE 65. 42 U.S.C.20009-2; 46 F.P.D.2d-11-720 (sic).

B. NATURE OF THE CASE

1) Briefly state the background of your case.

ON OR ABOUT MAY 18, 1986, I MADE REQUEST TO BE MOVED INTO ROOM 93 IN (H) WING AT THE NEVADA STATE PRISON. I REQUESTED TO MOVE BECAUSE MY ROOMATE (SIC) IS A HEAVY SMOKER. ON OR ABOUT MAY 23, 1986, THE UNIT COUNSEL, (SIC) BURNS SENT WORD BY THE UNIT OFFICER THAT I WOULD BE MOVED. I WROTE WARDEN H.L. WHITLEY AND EXPLAINED MY PROBLEMS TO HIM AND REQUESTED THAT I BE MOVED FOR RESON (SIC) THAT MY ROOMATE (SIC) SMOKED FIVE PACKS OF CIGARETTES A DAY. I'VE BEEN ASSIGNED TO AND LIVING IN ROOM #86 IN (H) WING SINCE MARCH 1986. I HAVE MADE REQUEST FOR A SINGLE ROOM, I'VE REQUESTED TO BE MOVED IN WITH A NON-SMOKER. I'VE SUFFER (SIC) FROM THE SMOKE, AND I'VE REQUESTED MEDICAL ATTENTION, GEORGE W. SUMNER, DIRECTOR OF PRISONS APPROVED OF JOHN NYE SELLING TOBACCO AND CIGARETTES TO INMATES WITHOUT ADEQUATE WARNING

LABELS ON THEM JOHN NYE SELLS THESE ITEMS TO INMATES. THE PRISON STAFF ALLOWS INMATES TO SMOKE CIGARETTES ANYWHERE EXCEPT THE DINING ROOM. THE OWNERS AND DISTRIBUTORS OF C.M. PRODUCTS INC., SELLS BEST BUY CIGARETTES TO PRISON INMATES WITHOUT PROPERLY INFORMING OF THE HEALTH HAZARDS AN INMATE THAT DOSEN'T (SIC) SMOKE COULD ENCOUNTER BY SHARING A ROOM WITH AN INMATE WHO SMOKE (SIC). PLAINTIFFS' (SIC) ROOMATE (SIC) BUYS THE CHEAPER BEST BUY CIGARETTE ONCE A WEEK. OTHER INMATES SMOKE THE SAME BRAND OF CIGARETTES DAILY WHILE IN CLOSED CONFINES WITH THE PLAINTIFF. CIGARETTE SMOKING IS ALLOWED IN THE CLASS ROOMS AND THE LAW LIBRARY AT THE NEVADA STATE PRISON.

BROWN & WILLIAMSON TOBACCO CORPORATION SELLS BUGLAR CIGARETTE TOBACCO TO THE PRISON INMATES' CANTEEN WITHOUT PRO-

VIDING WARNINGS ON THE PRODUCTS TO ALERT THE NON-SMOKER OF THE HEALTH HAZARDS HE WILL ENCOUNTER BY BEING HOUSED WITH INMATES WHO SMOKE.

PLAINTIFF ROOMATE, (SIC) LAWRENCE GREEN, BUYS AND SMOKES BUGLAR AND SO DO OTHER INMATES IN (H) WING.

AT THE NEVADA STATE PRISON BLACK AND WHITE INMATES ARE HOUSED ON AN EQUAL BASIS: ON OR ABOUT MAY 18, 1986, THERE WAS A ROOM OPEN (VACANT) IN (H) WING IN UNIT #2 FOR A BLACK INMATE, BUT PRISON OFFICIALS, KNOWING OF PLAINTIFFS' (SIC) REQUEST TO MOVE INTO THE PARTICULAR ROOM, MOVES A WHITE INMATE INTO THE ROOM FORCING PLAINTIFF TO STAY IN THE ROOM WITH A HEAVY SMOKER. ALL OF MY ROOMATES (SIC) HAVE BEEN HEAVY SMOKERS. PLAINTIFF IS PRESENTLY HOUSED IN THE ROOM WITH ANOTHER HEAVY SMOKER AND HAS MADE NUMEROUS REQUEST (SIC) TO MOVE. PRISON

OFFICIALS DO NOT SCREEN INMATES FOR PERSONAL HABITS THAT MAY BE DETREMENTAL (SIC) TO PLAINTIFFS' (SIC) HEALTH BEFORE HOUSING THEM TOGETHER.

THAT R.J. REYNOLDS TOBACCO COMPANY SELLS (CAMEL CIGARETTES) TO PRISON OFFICIALS WHO IN TURN SELLS THEM TO PRISONERS. NONE OF THE TOBACCO PRODUCTS SOLD TO PRISONERS PROVIDE THE PROPER INGREDIENTS INFORMATION.

THAT CAMEL CIGARETTES ONCE LIT WILL BURN CONTINUOUSLY RELEASING SOME TYPE OF CHEMICAL.

THAT R.J. REYNOLDS TOBACCO COMPANY HAS A BUSINESS CONTRACT WITH DEFENDANT PRISON OFFICIALS.

DEFENDANT PRISON OFFICIALS HAVE DONE NOTHING TO SEPARATE THE NON-SMOKING INMATES FROM THE SMOKERS.

THE NEVADA STATE PRISON IS OVER CROWDED.

THERE ARE NINETY SIX (96) INMATES IN EACH UNIT IN THE PRISON'S GENERAL POPULATION AND APPROXIMATELY SIXTY SIX (66%) OF THOSE SMOKE CIGARETTES.

C. CAUSE OF ACTION

1) I allege that the following of my constitutional rights, privileges or immunities have been violated and that the following facts form the basis for my allegations: [If necessary you may attach up to two additional pages (8½" x 11") to explain any allegation or to list additional supporting facts.]

a)(1) County I: HEALTH DAMAGES BY CIGARETTE SMOKE

(2) Supporting Facts: (Include all facts you consider important, including names of persons involved, places and dates. Describe exactly how each defendant is involved. State the facts clearly in your own words without citing legal authority or argument.)

MY NOSE BLEED (SIC) AND RUN MUCUS CONSTANTLY; EXSPECIALLY (SIC) WHEN I HAVE TO ENHALE (SIC) CIGARETTE SMOKE. THE ROOM IS VERY SMALL AND THE LIVING QUARTERS AND THE LAW LIBRARY IS NOT EQUIPED (SIC) WITH AIR CONDITION. I HAVE HEADACHES OFTEN. AND I DON'T HAVE ENERGY TO EXERCISE.

b)(1) Count II: SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT

(2) Supporting Facts:

THE DEFENDANT DISTRIBUTORS' CIGARETTE PRODUCTS DO NOT SHOW WHAT CHEMICALS ARE USED TO CURE AND PACKAGE THEIR CIGARETTES AND TOBACCO. I'M SHORT OF BREATH AND I HAVE CHEST PAINS THAT STARTED IN MARCH 1986.

c)(1) Count III: DENIED EQUAL PROTECTION OF LAW

(2) Supporting Facts:

C.M. PRODUCTS INC., PROVIDED AN INADEQUATE WARNING ON THEIR (BEST BUY)

CIGARETTES; THE WARNING PERTAINS ONLY TO PREGNANT WOMEN. LABELS CONTAINS (SIC) NO INFORMATION AS TO THE INGREDIENTS OF THE CIGARETTES.

D. PREVIOUS LAWSUITS AND ADMINISTRATIVE RELIEF

1) Have you begun other lawsuits in state or federal courts dealing with the same facts involved in this action or otherwise relating to the conditions of your imprisonment? Yes XXX No ___ If your answer is "Yes", describe each lawsuit. (If there is more than one lawsuit, describe the additional lawsuits on another piece of paper, using the same outline.)

a) Parties to previous lawsuit:
   Plaintiffs: WILLIAM McKINNEY
   Defendants: WILLIAM LATTIN, et al.

b) Name of court and docket number:
   U.S. DISTRICT COURT DISTRICT OF NEVADA CV-S-85-314;R.D.F.;

c) Disposition: (For example: Was the case dismissed? Was it appealed? Is it still pending?) THE CASE IS STILL PENDING

d) Issues raised: SUBJECTED TO RACIAL DISCRIMINATION,CRUEL AND UNUSUAL PUNISHMENT AND DENIAL OF DUE PROCESS.

e) Approximate date of filing lawsuit: 2/16/1985

f) Approximate date of disposition: N/A

2) I have previously sought informal or formal relief from the appropriate administrative officials regarding the acts complained of in Part C. Yes XXX No ___ If your answer is "Yes", briefly describe how relief was sought and the results. If your answer is "No", briefly explain why administrative relief was not sought.

I'VE MADE NUMEROUS REQUEST TO MOVE IN WITH A NON-SMOKER. MY LAST REQUAST (SIC) WAS MADE TO PRISON OFFICIALS ON OR ABOUT 12-10-86 BUT I'VE RECEIVED NO RESPONSE.

E. REQUEST FOR RELIEF

1) I believe that I am entitled to the following relief:

THAT THIS COURT ISSUE A PRELIMINARY INJUNCTION AGAINST DEFENDANT PRISON OFFICIALS PROHIBITING THEM FROM HOUSING HIM WITH INMATES WHO SMOKE. THAT EACH DEFENDANT BE SUED IN HIS OFFICIAL, PERSONAL AND INDIVIDUAL CAPACITY; THAT EACH DEFENDANT PAY PLAINTIFF $1,000,000.00 IN PUNITIVE DAMAGES; THAT EACH DEFENDANT PAY PLAINTIFF $100,000.00 FOR SUBJECTING HIM TO CRUEL AND UNUSUAL PUNISHMENT; THAT EACH DEFENDANT PAY PLAINTIFF $5,000,000.00 FOR JEOPADIZING (SIC) HIS HEALTH; THAT EACH DEFENDANT PAY

PLAINTIFF ATTORNEY FEES AND COURT COST.

IN PRO PER
Signature of Attorney (if any)

N/A

(Attorney's full address and telephone number)

(illegible)
Signature of Plaintiff

DECLARATION UNDER PENALTY OF PERJURY

The undersigned declares under penalty of perjury that he is the plaintiff in the above action, that he has read the above complaint and that the information contained therein is true and correct. 28 U.S.C. §1746. 18 U.S.C. §1621.

Executed at CARSON CITY, NEVADA 89701
(Location)
on DECEMBER 18, 1986.
(Date)

(illegible)
(Signature)

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
(Caption omitted in printing)

ANSWER TO CIVIL RIGHTS COMPLAINT

Case No. CV-N-87-36-ECR

(Filed March 13, 1987)

Defendants Anderson, Ployhar, Whitley, Sumner and Nye, by and through their counsel, BRIAN McKAY, Attorney General of the State of Nevada, hereby answer the civil rights complaint of Plaintiff William McKinney as follows:

A. JURISDICTION

1) Admitted.

2) Defendant Harol Whitley admits that he is the Warden of the Nevada State Prison and that his business address is P.O. Box 607, Carson City, Nevada, 89702.

3) Defendant George Sumner admits that he is the Director of the Nevada Department of Prison and that his business address if P. O. Box 7011, Carson City, Nevada, 89702.

3)(a) Admitted.

3)(b) Admitted.

3)(c) Not Applicable.

3)(d) Admitted.

3)(e) Not Applicable.

3)(f) Not Applicable.

4) Defendants admit that the jurisdiction alleged by plaintiff would be proper if his complaint had merit.

B. NATURE OF THE CASE

Defendants admit that plaintiff has, at various times, requested relief from being celled with inmates who are smokers. Defendants deny that they have done nothing to separate the nonsmoking inmates from the smokers, and allege that they have made efforts to do so, to the greatest extent possible. Defendants further admit that a majority of the inmate at Nevada State Prison are smokers. Defendants are without sufficient knowledge or belief as to the

remaining allegations contained in the Nature of The Case and therefore deny those allegations.

C. CAUSE OF ACTION

1)a)(1) Count I: Denied.

a)(2) Supporting Facts: Denied.

1)b)(1) Count II: Denied.

b)(2) Supporting Facts: Denied.

1)c)(1) Count III: Denied.

c)(2) Supporting Facts: Denied.

D. PREVIOUS LAWSUITS AND ADMINISTRATIVE RELIEF

1) No response necessary.

2) Defendants admit that plaintiff has made requests to be allowed to live with a nonsmoker.

E. REQUEST FOR RELIEF

Defendants deny that plaintiff is entitled to any relief.

. . .

. . .

. . .

AFFIRMATIVE DEFENSES

1) Plaintiff McKinney has failed to state a claim upon which relief can be granted.

2. Plaintiff McKinney is solely responsible for all matters which he alleges by virtue of his own negligent, grossly negligent and/or intentional acts.

3. Defendants are immune from suit in that at all relevant times, defendants have acted in good faith and in accordance with all applicable local, state or federal law.

WHEREFORE, defendants request that plaintiff take nothing by virtue of his complaint and that the complaint be dismissed with prejudice and that defendants be granted their costs of suit and such

. . .

. . .

. . .

other and further relief as the court deems appropriate in the premises.

DATED this 13th day of March, 1987.

BRIAN McKAY
Attorney General

By: /s/ John H. Cary
John H. Cary
Deputy Attorney General
Criminal Justice Division

(Certificate of Service omitted in printing).

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
(Caption omitted in printing)

AFFIDAVIT OF DON HELLING

Case No. CV-N-87-36-ECR

(Filed June 19, 1987, as Exhibit A to Opposition to Motion for Preliminary Injunction)

STATE OF NEVADA)
)
Carson City)

I, DON HELLING, being first duly sworn, hereby depose and state that:

1. I am the Chief Classification Counselor and, until recently, the Acting Associate Warden for Prog. at Nevada State Prison, and I make this affidavit in support of defendants' Opposition to Plaintiff's Motion for Preliminary Injunction.

2. Classification decisions at Nevada State Prison are based upon many factors, and both the needs of the institution and the needs of the inmate are taken into

account. Institutional security is, of course, the most important consideration.

3. In classifying an inmate, the inmate's institutional history and criminal history are both relevant. In the broadest sense, inmates are first classified to a particular housing category such as general populations, protective custody, administrative segregation and disciplinary segregation.

4. Once an inmate has been classified into one of these categories, he is then assigned to a particular unit, wing and cell. Among the factors considered in making this decision are possible enemy situations, the age of the inmate, friendships and ethnic balance within particular housing wings. The personal desires of the inmate are also taken into account insofar as practical.

5. In his motion for preliminary injunction, McKinney has asked for an order

prohibiting the classification committee from housing him in any wing of any unit which houses inmates who smoke. Such an order would place an undue burden upon the classification process, as it would severely limit the prison's housing options with regard to the inmate. It might make it more difficult or even impossible to place McKinney in a segregation unit, should his actions justify such a move, as such a unit might already contain inmates who smoke.

6. Based upon my experience, I would estimate that two-thirds of the inmate at NSP smoke or use other tobacco products. Smoking is very important to many inmates, and I believe that if smoking were banned at NSP it would create a potentially dangerous situation due to the anger of those inmates who do smoke,

. . .

and constitute a threat to the security of the institution.

DATED this 18 day of June, 1987.

(illegible)
DON HELLING

SUBSCRIBED and SWORN to before me this 18th day of June, 1987.

Joy Brewer
NOTARY PUBLIC

(Notary seal omitted in printing)

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
(Caption omitted in printing)

MAGISTRATE'S REPORT AND RECOMMENDATION

Case No. CV-N-87-36-ECR

(Filed April 8, 1988)

This report and recommendation is made to the Honorable Edward C. Reed, Jr., United States District Judge. The matter was referred to the Magistrate pursuant to 28 U.S.C. § 636(b)(1)(B). On September 3, 1987 defendants filed a Motion for Summary Judgment (court docket #15A) which plaintiff opposed on September 15, 1987 (court docket #17). No reply was filed. No hearing was requested and none has been had.

In their pleadings both parties rely on matters argued in pleadings filed regarding plaintiff's Motion for Preliminary Injunction and Temporary Restraining order filed in February 3, 1987 (court docket #4). Defendants opposed the motion

on June 19, 1987 (court docket #11) and plaintiff replied on July 6, 1987 (court docket #12). The Motion for Injunctive Relief was ordered consolidated with an advanced trial date set for September 22, 1987 (Order of July 20, 1987 - court docket #13) which was vacated upon defendants' motion pending determination of the Motion for Summary Judge. See Order of September 9, 1987 - court docket #16.

The Complaint

In the complaint filed January 28, 1987, plaintiff, an inmate of the Nevada State prison, alleged that he is assigned a room with another inmate who is a heavy smoker and that all of his roommates have been heavy smokers. he states that he has requested to be moved to a single room or to a room with a nonsmoker on numerous occasions. He estimates that of the 96 inmates in each unit approximately two-thirds smoke cigarettes.

He claims that the prison officials do not screen inmates for personal habits and have done nothing to separate nonsmoking inmates from smokers. He complains that his nose bleeds and runs mucus constantly but especially when he inhales cigarette smoke; that he has frequent headaches, lacks energy to exercise, is short of breath and that he has had chest pains since March, 1986 (when he was moved to his present room). He states that his roommate smokes five packs of cigarettes a day; that their room is very small and not equipped with air conditioning. He also complains that cigarette smoking is allowed in classrooms and at the law library at the Nevada State Prison.

His complaints about the tobacco companies are that they sell cigarettes to the prison (which are then sold to inmates at the canteen) which cigarette

packages do not provide proper ingredient information or a warning to alert the nonsmoker of the health hazards he may encounter by being housed with inmates who smoke. The tobacco company defendants have not been served or entered an appearance. Thus the defendants referred to here are those who are employees or officers of the Nevada Department of Prisons (NDOP) and the issues discusses relate to those defendants.

The answer filed March 13, 1987 (court docket #9) on behalf of Pat Anderson, NSP Associate Warden; Carol Ployhar, NSP counselor; H.L. Whitley, NSP Warden; George Sumner, Director of the NDOP; and John Nye, NSP Store Manager, admitted that plaintiff has requested relief from being housed with inmates who smoke and that a majority of NSP inmates smoke.

In the complaint plaintiff requests money damages, an injunction prohibiting defendants from housing him with inmates who smoke, costs and attorney fees. His Motion for Preliminary Injunction requests that the court prohibit the defendants from moving plaintiff in any wing of any housing unit with inmates allowed to smoke cigarettes.

Motion for Summary Judgment

Legal Standard

In June, 1986 the United States Supreme Court set forth the standards that are to be applied in determining a Motion for Summary Judgment in two decisions.

In Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505 (1986), the court stated that the materiality of the facts in dispute rests on the substantive law of the case and it is the substantive law's identification of which facts are

critical and which facts are irrelevant that governs. Ibid., 2510. There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. The mere existence of a scintilla of evidence in support of the plaintiff's position will not be sufficient; there must be reasonable evidence on which the jury could reasonably find for the plaintiff. Ibid., 2511-2512.

In Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548 (1986), the court noted that summary judgment is not a disfavored procedural shortcut but an integral part of the federal rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action and that Rule 56

must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury but also for the rights of persons opposing such claims and defenses to demonstrate, in the manner provided by the rule prior to trial, that the claims and defenses have no factual basis. Ibid., 2555. The moving party need not support its motion with affidavits or other materials negating the opponent's claim. Regardless of whether the moving party accompanied its summary judgment motion with affidavit, the motion may and should be granted so long as whatever is before the court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c) is satisfied.

> One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses,

> and we think it should be interpreted in a way that allows it to accomplish this purpose. Ibid., 2553.

It should be remembered, however, that credibility determinations, weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether his ruling is on a motion for summary judgment or for a directed verdict. Evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in his favor. Trial courts should act with caution in granting summary judgment and may deny summary judgment where there is reason to believe that the better course would be to proceed to a full trial. Anderson v. Liberty Lobby, Inc., supra. 2513-2514.

Defendants' Argument

In their Motion for Summary Judgment defendants contend: (1) that plaintiff has failed to properly allege the

personal involvement of defendants Anderson and Ployhar; (2) that plaintiff, in the complaint and in the Motion for Preliminary Injunction, has failed to show the existence of a constitutional right to be incarcerated in a smoke-free environment; and (3) that even if such a constitutional right did exist, the non-separation of smokers from nonsmokers is reasonably related to a legitimate penalogical (sic) interest.

In aid of their motion the defendants concede that smoking is allowed in all areas of the prison except the culinary and the infirmary. (Motion, p. 5-6). They rely on the affidavit of Don Helling to describe the classification process and the prison's concerns with what plaintiff requests. See Exhibit "A" to defendants' opposition to the Motion for Preliminary Injunction filed June 19, 1987 - court docket #11.

Helling, who is the Chief Classification Counselor and formerly Acting Associate Warden for Programs at NSP, stated that classification at NSP is based on numerous considerations. The inmate's institutional and criminal histories are used to classify the inmate into a particular housing category such as general population, protective custody, administrative segregation and disciplinary segregation. Once an inmate has been classified into one of these categories he is assigned to a particular unit, wing and cell. Among the factors considered in making this decision are possible enemy situations, the age of the inmate, friendships, ethnic balance within a particular housing unit, and so far as possible the personal desires of the inmate.

Mr. Helling estimates that two-thirds of the prison population at NSP smoke or

use other tobacco products. He further states that smoking is very important to many inmates and were smoking banned at NSP it would create a potentially dangerous situation due to anger of those inmates who do smoke and would constitute a threat to the security of the institution.

He states that an order prohibiting the classification committee from housing the plaintiff in any wing which houses inmates who smoke would place an undue burden upon the classification process as it would severely limit the prison's housing options regarding the inmate and would make it difficult or impossible to place plaintiff in a segregated unit should his actions justify such a move.

Plaintiff's Opposition

Plaintiff argues that the prison officials named are all in some way personally knowledgeable or responsible

for the situation. He states that Pat Anderson is aware that inmates smoke cigarettes in the law library; that the building does not have windows capable of being opened and that there is inadequate ventilation in the building. (He states that he has nine legal actions pending and must use the law library on a daily basis.) He states that Carol Ployhar sits on the prison's disciplinary committee and is aware of a provision in the Code of Penal Discipline which prohibits inmates from (sic) in unauthorized areas and that she realized this rule discriminates against nonsmokers because it does not protect them in housing units and the prison's law library. He states she is responsible for screening inmates for personal habits but does not screen them regarding smoking. He argues that he has a constitutional right to be incarcerated in a smoke-free environment

and that the laws which control cigarette smoking in public places and the food and drug laws must be enforced in every segment of society, including prisons, under the Nevada Constitution, Article 1, Section 1.

Discussion

The factual situation regarding a number of issues in (sic) uncontested. Approximately two-thirds of the inmates of NSP smoke cigarettes or use other tobacco products. Smoking is allowed in all areas of the prison except for the culinary and the infirmary. Whether or not an inmate smokes is not considered a significant factor, if considered at all, in determining the cell and cellmate an inmate is assigned. Plaintiff has requested that he be assigned a nonsmoking cellmate or other housing arrangements but his request has not been granted.

The defendants take the position that prohibiting smoking would cause significant anger and security problems among many inmates who do smoke and that requiring the assignment of nonsmoking inmates to smoke-free areas would greatly burden the classification process and would make certain disciplinary segregation assignments extremely difficult if not impossible.

For the purpose of this motion the defendants have not addressed plaintiff's health situation, i.e. his complaints about how tobacco smoke affects him. Correspondingly, plaintiff has not substantiated his physical problems with a physician's evaluation, etc. (Nor was he required to do so given the basis of the defendants' motion.) Likewise plaintiff has not challenged the defendants' claim that there exists a legitimate penological interest in not

accommodating a preference for a smoking or nonsmoking environment. He simply concluded that it was their job to take care of such problems.

The court has been unable to find any case law specifically holding that a nonsmoking inmate has a constitutional right to a smoke-free environment. However, that does not dispose of the matter. The Eighth Amendment draws its meaning from "the evolving standards of decency that mark the progress of maturing society." The affect of tobacco smoke on nonsmokers, especially those with particular medical needs or allergic reactions, is a growing subject of sensitivity in this society. See for example, 14 A.L.R. 4th 1234, Annotation: "Right to Unemployment Compensation as Affected by Employee's Refusal to Work in Areas Where Smoking is Permitted," and 37 A.L.R. 4th 480, Annotation: "Right of Employee to

Injunction Preventing Employer from Exposing Employee to Tobacco Smoke in Workplace." The court does not mean to suggest that employee standards apply to prisoners, but only that sensitivity to this issue appears to be evolving along with scientific and medical findings in the area.

The accepted manner of analyzing the smoking/nonsmoking situation appears to not be on the basis of whether a per se constitutional right exists but rather on the constitutional grounds of : (1) whether any of the defendants have been deliberately indifferent to plaintiff's serious medical needs under the reasoning of Estelle v. Gamble, 429 U.S. 97, 97 S. Ct. 285 (1976) and (2) whether the conditions in which the plaintiff has been housed constitute a deliberate indifference of pain and suffering under Rhodes v. Chapman, 452 U.S. 337, 101

S. Ct. 2392 (1981). See Beeson v. Johnson, 668 F.Supp. 498, 501 (E.D. N.C. 1987) which used this approach and discussed the type of issues presented here. The method is consistent with the reasoning in Lee v. Carson, 645 F. Supp. 1430, 1436-8 (S.D. N.R. 1986), affirmed without opinion at 812 F.2d 712 (2nd Cir. 1987) discussed by the parties but providing little comment on the smoking issue; and Franklin v. State of Oregon, 662 F.2d 1337, 1347 (9th Cir. 1981) known as Franklin I , in which a prisoner's complaint that he had been placed in a cell with a heavy smoker of cigarettes caused serious danger to his health because of a throat tumor, was held to raise an arguable claim not wholly insubstantial and subject to sua sponte dismissal.

Plaintiff's allegations of physical symptoms and harm from being in close

quarters with a heavy smoker have been raised in the complaint making them issues of material fact under the substantive law applicable to the case. Consequently, defendants have not satisfied their burden under Fed.R.Civ.P. 56(c) of showing that there remains no genuine issue of material fact to be tried and that they are entitled to judgment as a matter of law. The Motion for Summary Judgment should be denied. The court does note that defendants' contentions regarding defendants Anderson and Ployhar are well taken in that the complaint does not adequately allege their participation and involvement, but it appears that Ployhar as plaintiff's unit counselor and Anderson as Associate Warden were very likely recipients of plaintiff's requests for a move and plaintiff could make his allegations adequate.

Related Matters

As noted above, the trial date was vacated during the pendency of the Motion for Summary Judgment. Plaintiff's motion for subpoena to produce expert witnesses (court docket #14A) and petition for writ of habeas corpus ad testificandum (court docket #14B), both filed August 21, 1987, were left pending because they applied to the combined trial date. These motions are nondispositive pretrial matters under 28 U.S.C. § 636(b)(1)(A) which are being determined in a separate order.

Ordinarily the action should be reset for the combined hearing and trail if the District Court adopts this report and recommendation. However, the legal grounds of this report and recommendation and of the companion ruling on plaintiff's witnesses may suggest to the parties (and especially to plaintiff inasmuch as he has the burden of proof)

that they need further development of the facts before proceeding to present their evidence. Therefore, as a part of their objections or responses, or as a separate statement within the same time period allowed for objections, the parties should inform the District Court whether they are ready to proceed to expedited trial or whether they need additional time. It is pointed out to plaintiff that he would in such a case be in effect waiving his right to an advanced hearing date. The parties should also be aware that the court may require the filing of a joint prehearing (proposed) order.

RECOMMENDATION

For the reasons set forth above, the Magistrate recommends that the District Court issue its order denying defendants'

. . .

. . .

Motion for Summary Judgment filed September 3, 1987 (court docket #15A).

DATED this 8th day of APRIL, 1988.

/s/Phyllis Halsey Atkins
UNITED STATES MAGISTRATE

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
(Caption omitted in printing)

O R D E R

Case No. CV-N-87-36-ECR

(Filed May 5, 1988)

The court having reviewed the report and recommendation of the magistrate filed herein April 8, 1988 regarding defendants' Motion for Summary Judgment (court docket #15A) and no objections having been filed thereto,

IT IS HEREBY ORDERED:

1. The magistrate's recommendation is hereby adopted;

2. Defendants' Motion for Summary Judgment (filed September 3, 1987 - court docket #15A) is hereby denied.

DATED this 5 day of MAY, 1988.

/s/Edward C. Reed
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
(Caption omitted in printing)

PROPOSED JOINT PRE-TRIAL ORDER

Case No. CV-N-87-36-ECR

(Filed January 11, 1989)

Following pretrial proceedings in this cause pursuant to Local Rule 190-3,

IT IS ORDERED:

I.

This is an action for injunctive relief and damages which has been brought by William McKinney, an inmate incarcerated at nevada State prison in Carson City, Nevada. The defendants who have been served include George Sumner, the Director of the Nevada Department of Prisons; Harol Whitley, the Warden at Nevada State Prison; Pat Anderson, the former Associate Warden of Programs at Nevada State Prison; Carol Ployhar, a Counselor at Nevada State Prison; and John Nye, formerly in charge of the prison canteen

at Nevada State Prison. Also named as defendants, but not served in this case, are the distributors and owners of C. M. Products; Brown & Williamson Tobacco Company; and R.J. Reynolds Tobacco Company.

McKinney alleges that the defendants have acted to deprive him of his rights under the eighth amendment to the United State Constitution to be free from cruel and unusual punishment. He contends that his health has been damages by the cigarette smoke of other inmates at the prison and claims that he is constitutionally entitled to be housed in a smoke-free environment. He seeks damages in the amount of $6,100,000.00 from each defendant, as well as costs and attorney fees, and requests that the court enter an injunction prohibiting the defendants from housing him in any wing of any unit which also houses smokers.

The defendants allege that McKinney has no such constitutional right, and even if he does, that they have acted in good faith and are therefore immune from liability.

II.

STATEMENT OF JURISDICTION

McKinney has invoked jurisdiction pursuant to 28 U.S.C. § 1343(a)(3) and 42 U.S.C. § 1983. He also claims jurisdiction under 42 U.S.C. §§ 1981, 1985(3), 1986, and 20009-2. The defendants agree that jurisdiction is proper under 28 U.S.C. § 1343(a)(3) and 42 U.S.C. § 1983.

III.

The following facts are admitted by the parties and require no proof:

1. At all relevant times, plaintiff William McKinney has been an inmate incarcerated at Nevada State Prison in Carson City, Nevada.

2. At all relevant times, defendant George Sumner has been the Director of the Nevada Department of Prisons.

3. AT all relevant times, defendant Harol Whitley has been the Warden at Nevada State Prison.

4. At the time the complaint was filed and until approximately December of 1987, defendant Pat Anderson was the Associate Warden of Programs at Nevada State Prison.

5. At the time of the filing of the complaint and presently, defendant Carol Ployhar was and is a counselor at Nevada State Prison.

6. At the time of the filing of the complaint, defendant John Nye supervised the operation of the prison canteen.

7. Approximately two-thirds of the inmates at Nevada State Prison are cigarette smokers or use other tobacco products.

8. There are no restrictions on smoking in the prison's housing units, classrooms or law library. Inmates are not permitted to smoke in the infirmary or culinary.

IV.

The following facts, though not admitted, will not be contested at trial by evidence to the contrary:

None.

V.

The following are the issues of fact to be tried and determined upon trial:

1. What requests, if any, has McKinney made of the defendants with regard to being housed with non-smokers?

2. What actions, if any, have the defendants taken to accommodate McKinney's wishes?

3. To what degree is McKinney exposed to cigarette smoke?

4. Has McKinney's health been injured by exposure to cigarette smoke, and, if so, to what extent?

5. Does McKinney have any medical condition which makes him particularly susceptible to ill health as a result of exposure to cigarette smoke?

6. What personal involvement, if any, has each of the defendants had in the matters alleged by McKinney?

7. How would a ban on smoking effect the operation of Nevada State Prison?

VI.

The following are the issues of law to be tried and determined upon trial:

1. Have the defendants been deliberately indifferent to the serious medical needs of McKinney, and have they therefore violated his right to be free from cruel and unusual punishment?

2. Does McKinney have a constitutional right to be housed in a smoke-free environment?

3. What damages, if any, has McKinney suffered?

4. Is an award of punitive damages appropriate in this case?

5. Is McKinney entitled to injunctive relief prohibiting the defendants from housing him in any wing of any unit which also houses smokers?

6. Are the defendants entitled to good faith immunity? *Plaintiff objects to No. 6. Signed William McKinney, #13355.*

VII.

A. The following exhibits are admissible in evidence in this case and may be marked in evidence by the clerk:

1. Plaintiff's Exhibits:

a. Administrative DOP 3044 form filed on May 19, 1986

b. Kites in reply from Carol Ployhar dated October 15, 1986 and February 4, 1987

c. Kites addresses to Roger Jacobs dated July 28, 1987

d. Kite addressed to doctor of NSP dated August 16, 1987

e. Medical prescription label from Doctor Harrison dated August 25, 1987

f. Kite to Doctor Harrison of NSP medical department dated April 18, 1988

g. Kite to Doctor Harrison dated April 24, 1988

h. Administrative DOP 3044 form filed on June 21, 1988, addressed to Carol Ployhar

i. Administrative DOP 3044 form filed on August 4,m

1988, addressed to George W. Sumner

j. Administrative DOP 3044 form filed on July 15, 1987, addressed to Pat Anderson

k. Second set of interrogatories to Las Vegas, Nevada, attorney Joan Buckley, dated August 17, 1987

l. Defendants' answer to plaintiff's first set of interrogatories served to plaintiff on the 25th day of March, 1987

m. Kite to Pat Nixon, Unit Counselor, dated June 22, 1988, with attached Administrative DOP form file dated June 19, 1988

n. Four kites addressed to unit counselor Stephanie

Nixon, dated August 3, 1988, August 5, 1988, August 11, 1988, and August 24, 1988

o. Kites addressed to Doctor Harrison dated May 5, 1988

p. Cigarette pack labels from R. J. Reynolds Tobacco Corp. from 1987

q. Cigarette pack labels from Brown & Williamson Tobacco Corp. from 1986

r. An NSP inmate store voucher, item ticket, and store list dated May 24, 1986, from one of my roomates (sic), Lawrence Green, #14996

s. A pamphlet entitled "A Pathologist's View of the Effects of Smoking on the

Human Body" by C. L. Dale, M.D., Pathologist

t. A pamphlet written by a dentist on cigarette smoking, Arden G. Christen, D.D.S., M.S.D.

u. A letter from Stephanie E. Hunter, Northern Area Director of the American Cancer Society, and five pamphlets from the American Cancer Society on sidestream (sic) cigarette smoke and its effect upon the nonsmoker.

v. An article from the Muscle and Fitness magazine of March, 1988, Volume 49, No.3, by Armand Tanny

w. Tobacco information sheet from Newton, MA, Education Development Center, Inc.

2. Defendant's Exhibits:

a. Institutional records regarding William McKinney.

b. McKinney's prison medical records.

c. Records relating to the operation of the Nevada State Prison canteen.

B. As to the following exhibits the parties have reached the stipulations stated regarding the same:

1. Plaintiff's Exhibits:

None.

2. Defendant's Exhibits:

None.

C. As to the following exhibits, the party against whom the same will be offered objects to their admission upon the grounds stated:

1. Plaintiff's Exhibits: The plaintiff may object to certain of the

defendants' exhibits on the grounds of relevance and hearsay.

2. Defendant's Exhibits: The defendants may object to certain of the plaintiff's exhibits on the grounds of relevance and hearsay.

D. Depositions:

No depositions will be offered.

E. Objections to Depositions:

1. Defendants object to plaintiff's depositions as follows:

None.

2. Plaintiff objects to defendants' depositions as follows:

None.

VIII.

The following witnesses may be called by the parties upon trial:

A. Plaintiff's Witnesses:

1. Alex Seiver, Nevada State Prison, Carson City, Nevada
2. Johnny Lee Brown, Nevada State Prison, Carson City, Nevada
3. Brian Marshall, Nevada State Prison, Carson City, Nevada
4. Carlos Shanklin, Nevada State Prison, Carson City, Nevada
5. Jon Benjamin Odoms, Nevada State Prison, Carson City, Nevada
6. Kenneth Krause, Nevada State Prison, Carson City, Nevada
7. Daniel Richman, Nevada State Prison, Carson City, Nevada
8. Larry Facell, Northern Nevada Correctional Center, Carson City, Nevada
9. George Grimble, Nevada State Prison, Carson City, Nevada

B. Defendant's Witnesses:

1. All defendants
2. Dr. Mellonese Harrison, Nevada State Prison, Carson City, Nevada
3. Don Helling, Chief Correctional Casework Specialist, Nevada State Prison, Carson City, Nevada

IX.

Plaintiff and defense counsel have met and herewith submit a list of three (3) agreed upon trial dates which fall on either the second or fourth Tuesday of the month and which days are not earlier than forty-five (45) nor more than one hundred twenty (120) days from the date this stipulated pre-trial order is filed with the clerk. It is expressly understood by the undersigned that the clerk will set the trial of this matter on one of the agreed upon dates if possible; if

not, the trial will be set at the convenience of the court's calendar.

February 14, 1989

February 28, 1989

March 14, 1989

X.

It is estimated that trial herein will take five (5) days.

DATED this 7th day of December, 1988.

APPROVED AS TO FORM AND CONTENT:

_____
Plaintiff

_____
Attorney for Defendant

XI.

ACTION BY THE COURT

(a) This case is set down for trial on the STACKED calendar on April 18, 1989, at 9:30 A.M. Calendar call shall be at 8:30 a.m. on April 17, 1989.

(b) Motions in limine, if any, shall be filed and served not later than March

20, 1989 at 4:00 PM. Responses thereto shall be filed and served within two weeks thereafter. Such motions shall thereafter be submitted to the Court for decision without the filing of a final reply.

(c) Trial briefs shall be filed in original and two copies on or before April 10, 1989; the original shall be filed in the case file and the copies submitted to the Court. Briefs submitted without the extra copies shall be returned by the Clerk for compliance with this paragraph.

(d) Jury trials:

(1) Jury instructions requested by either party shall be submitted in the following manner:

On or before April 10, 1989, each party shall file an original and two copies of the following:

(i) A list, by number only, of any requested stock

instructions that are found in Devitt & Blackmar, Nevada Pattern or BAJI.

(ii) Each requested special instruction with citations to authority designated thereon.

All instruction, both stock and special, approved by the Court for submission to the jury, will be retyped by the Court.

(2) Suggested questions of the parties to be asked of the jury panel by the Court on voir dire shall be filed in original and two copies on or before April 10, 1989. Questions submitted without the extra copies shall be returned by the Clerk for compliance with this paragraph.

(e) Court trials: NOT APPLICABLE

(1) Proposed findings of fact and conclusions of law shall be filed in original and two copies on or before _____ _____. Proposed findings and conclusions submitted without the extra

copies shall be returned by the Clerk for compliance with this paragraph.

(f) Plaintiff and defense counsel shall serve a copy of any trial brief, proposed findings of fact and conclusions of law, proposed voir dire questions and proposed jury instructions upon the opposing party or his counsel contemporaneously with the filing thereof with the Court.

The foregoing pretrial order has been approved by the parties to this action as evidenced by the signature of plaintiff and defense counsel hereon, and the order is hereby entered and will govern the trial of this case. This order shall not be amended except by order of the Court pursuant to agreement of the parties or to prevent manifest injustice.

DATED: January 9, 1988.

/s/Phyllis Halsey Atkins
UNITED STATES MAGISTRATE

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
(Caption omitted in printing)

MINUTES OF THE COURT

Case No. CV-N-87-36-ECR

(Filed September 29, 1989)

PRESENT: HONORABLE PHYLLIS HALSEY ATKINS

UNITED STATES MAGISTRATE

DEPUTY CLERK: Bette Stewart

Reporter/Recorder: N/A

Counsel for Plaintiff(s): William McKinney, in Proper Person

Counsel for Defendant(s): Kevin Higgins, Deputy Attorney General

MINUTES OF PROCEEDINGS:

2:07 p.m. Court convenes.

This is the time set for hearing on defendants' motion in limine (Item 45) and for calendar call.

Arguments are held. IT IS ORDERED that defendants' motion in limine (Item 45) is granted. Those witnesses permitted to testify for plaintiff are Brian

Marshall, Carlos Shanklin, Jon Benjamin Odoms and Daniel Richmond. The parties will enter into a stipulation as to specific testimony.

Court and counsel confer as to the trial procedure, exhibits and the form of verdict. Counsel for defendants will prepare a revised form of verdict.

Plaintiff advised the Court that he requires access to specific legal papers. IT IS ORDERED that counsel for defendants arrange that plaintiff have access to these documents.

Plaintiff moves for appointment of counsel. Said motion is denied.

3:00 p.m. Court adjourns.

CAROL C. FITZGERALD, CLERK

By /s/ Bette Stewart
Bette Stewart
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
(Caption omitted in printing)

MINUTES OF THE COURT

Case No. CV-N-87-36-ECR

(Filed October 3, 1989)

PRESENT: HONORABLE PHYLLIS HALSEY ATKINS

UNITED STATES MAGISTRATE

DEPUTY CLERK: Bette Stewart

Reporter/Recorder: Jeanne Lange

Counsel for Plaintiff(s): William McKinney, in Proper Person

Counsel for Defendant(s): Kevin Higgins, Deputy Attorney General

MINUTES OF JURY TRIAL (FIRST DAY):

9:50 a.m. Court convenes. Roll taken. Twenty-four jurors present; four absent. IT IS ORDERED that jurors Willis G. Anderson, Roberta Braham, George Chamarro and Beatrice Nation appear and show cause why they should not be held in contempt of court for not appearing for jury duty. Both parties stipulate to proceed with

the jury trial in absence of those prospective jurors who failed to appear. Jury impanelment from 10:03 a.m. to 10:52 a.m.

11:02 a.m. Court recesses.

11:17 a.m. Court reconvenes. All present. Plaintiff's opening statement from 11:18 a.m. to 11:25 a.m. Defendants' opening statement from 11:26 a.m. to 11:34 a.m. Daniel C. Richmond, called as a witness by the plaintiff, is sworn, testifies, and is excused. Defendants' Exhibits J and K are marked and admitted. (11:35 a.m. - 11:52 a.m.)

Carlos O'Neill Shanklin, sworn as a witness for the plaintiff, testifies on direct examination. Plaintiff's Exhibit 1 and 2 are marked and admitted. Plaintiff's Exhibit 3 is marked and rejected. (11:55 a.m. - 12:11 p.m.)

12:11 p.m. Court recesses.

1:37 p.m. Court reconvenes. All present.

Carlos O'Neill Shanklin, testifies for the plaintiff on cross and redirect examination and is excused. Defendants' Exhibit M i marked and admitted. (1:37 p.m. - 1:47 p.m.)

John Benjamin Odoms, is called as a witness for the plaintiff, sworn, testifies and is excused. Defendants; Exhibit L is marked and admitted. (1:49 p.m. - 2:21 p.m.)

At the request of plaintiff, Court recesses at 2:22 p.m. 2:29 p.m. Court reconvenes. All present.

Brian Marshall, called as a witness for the plaintiff, is sworn, testifies and is excused. Defendants' Exhibit N is marked and admitted. (2:30 p.m. - 2:44 p.m.)

William McKinney is sworn and testified on his own behalf. Defendants' Exhibit F is marked. Defendants; Exhibits A, B, C, D, E, G, H, and I are marked and admitted. (3:30 p.m. to 4:22 p.m.)

Plaintiff's Exhibits 4 through 13 are marked and admitted.

IT IS ORDERED that jury trial be continued until October 3, 1989 at 9:30 a.m.

4:34 p.m. The jury is excused.

Plaintiff moves to introduce into evidence certain medical literature, copies of publications, advertisements, etc. Argument is held. The Court received the material and takes the matter under submission.

Defendants move for a directed verdict pursuant to Rule 50(a). Arguments held. The Court takes the matter under submission.

5:36 p.m. Court adjourns.

CAROL C. FITZGERALD, CLERK

By /s/ Bette Stewart
Bette Stewart
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
(Caption omitted in printing)

MINUTES OF THE COURT

Case No. CV-N-87-36-ECR

(Filed October 3, 1989)

PRESENT: HONORABLE PHYLLIS HALSEY ATKINS

UNITED STATES MAGISTRATE

DEPUTY CLERK: Bette Stewart

Reporter/Recorder: Jeanne Lange

Counsel for Plaintiff(s): William McKinney, in Proper Person

Counsel for Defendant(s): Kevin Higgins, Deputy Attorney General

MINUTES OF JURY TRIAL (SECOND DAY):

9:50 a.m. Court convenes out of the presence of the jury.

Plaintiff moves to reopen his case, filing and serving said written motion. Arguments are held. Said motion is denied.

That material which plaintiff moves to introduce into evidence on October 2,

1989, is marked as Plaintiff's Exhibit 14. Plaintiff's motion to introduce said material into evidence is denied, and Plaintiff's Exhibit No. 14 is rejected. Defendants' motion for a directed verdict pursuant to Rule 50(a), Fed.R.Civ.P., in favor of the defendants and against the plaintiff, is granted. The defendants will prepare proposed form of judgment.

10:37 a.m. The jury returns to the court-room and is excused.

10:39 a.m. Court adjourns.

CAROL C. FITZGERALD, CLERK

By /s/ Bette Stewart
Bette Stewart
Deputy Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

William K. Suter
Clerk of the Court

Area Code 202
479-3011

June 29, 1992

Kevin G. Higgins, Esquire
Deputy Attorney General of Nevada
Capitol Complex
Carson City, Nevada 89710

Re: 91-1958 - Donald L. Helling, et al. v. Willima (sic) McKinney

Dear Mr. Higgins:

The Court today entered the following order in the above stated case:

> "The motion of respondent for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted."

Enclosed are Memoranda describing the time requirements and procedures under the Rules, together with a Specification Chart for your use.

Please note that this case will be argued in the December or January Session. Requests for extensions of time to file briefs on the merits are not

favored. The Court requests that this case be briefed during it recess.

If you have any questions, please feel free to telephone me.

Very truly yours,

WILLIAM K. SUTER, CLERK

/s/ Sandy Nelsen
Sandy Nelsen
Assistant Clerk

Enclosures